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# In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN ANGUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The order of the court of appeals (Pet. App. A.1-A.3) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on October 18, 1978. A petition for rehearing was denied on November 24, 1978. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including January 23, 1979, and the petition was filed on January 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the record supports the district court's finding that the parties had never concluded a plea agreement.

## STATEMENT

On September 8, 1977, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to one count charging conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841. He was sentenced to six years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. A.1-A.2).

1. Petitioner entered his first guilty plea to this charge (the first count of a 31-count indictment) on December 23, 1975 (I Tr. 1-14).[1] At the Rule 11 hearing, the prosecutor and defense counsel informed the court that, in exchange for petitioner's plea of guilty to one count of the indictment, the government had agreed to dismiss the remaining counts and to refrain from seeking additional charges against petitioner (I Tr. 2-3). Thereafter, prior to sentencing petitioner obtained new counsel and moved the district court to withdraw his plea of guilty on the grounds of prosecutorial misconduct and ineffective assistance of counsel. At the outset of the hearing on this motion, the prosecutor stated that because there were sufficient indications that petitioner's guilty plea had resulted from ineffective assistance of counsel, the government did not oppose the withdrawal of the guilty plea (II Tr. 2-3). Defense counsel then requested that the court consider the motion to withdraw the plea as a motion to specifically enforce an alleged agreement he contended had been breached by the government (II Tr. 3, 5). The court granted petitioner's motion to withdraw the guilty plea but denied his oral motion for either

[1] "I Tr." refers to the December 23, 1975, Rule 11 hearing on petitioner's first guilty plea, "II Tr." to the June 16, 1976, hearing on petitioner's motion to withdraw his guilty plea, "III Tr." to the September 6 and 7, 1977, suppression hearing, and "IV Tr." to the September 7 and 8, 1977, Rule 11 hearing on petitioner's second guilty plea.



specific performance of the alleged agreement or for an evidentiary hearing to determine if the alleged plea agreement had been breached (II Tr. 5-6).

Thereafter, at a pretrial suppression hearing held September 6, 1977, to determine the admissibility of statements petitioner made to the government prior to the withdrawal of his plea, the district court heard testimony regarding the out-of-court negotiations that led to the entry of petitioner's December 23 guilty plea. The crucial negotiations took place in a hurried fashion in a hallway outside the courtroom where the district court had scheduled a hearing on the government's motion to revoke petitioner's bond (III Tr. 19-20, 68-69).

The Assistant United States Attorney who represented the government in these negotiations testified that he had told defense counsel that, in exchange for petitioner's guilty plea on the first count of the indictment, the government would agree to dismiss the remaining counts and not to seek a second indictment charging petitioner with conducting a criminal enterprise (III Tr. 66). The prosecutor also stated that petitioner had agreed to cooperate with the government (III Tr. 67). The prosecutor denied that he had ever indicated that the government would recommend probation, or indeed make any sentencing recommendation, although he stated that he had agreed that any cooperation by petitioner would be made known to the sentencing court (III Tr. 68).

Thomas Howard, who had been petitioner's counsel at the time of these negotiations, testified that he could not recall the details of his conversation with the prosecutor; but he stated that it was his understanding that the government had agreed, if petitioner provided evidence of a number of serious narcotics violations,[2] that petitioner

[2] Petitioner's counsel stated these were to be "Class A" cases (III Tr. 25). DEA classifies cases according to seriousness, and Class

would be placed on probation—"subject, of course, to the approval of the Court" (III Tr. 24-25). Petitioner testified that Mr. Howard had told him that he would receive probation if he made "three deals" for the government (III Tr. 128-129).[3]

Agent Seward, who was also present during the negotiations, testified that it was his understanding that the agreement was that petitioner would plead guilty to one count, his bond would be continued, and he would cooperate with the government (III Tr. 45). He added that defense counsel had pressed for an agreement that if petitioner provided evidence in three or five narcotics cases the government would make a recommendation to the court for probation (III Tr. 46). Finally, Seward stated that so far as he knew the prosecutor had not agreed that if petitioner furnished information regarding a certain number of cases the government would recommend probation (III Tr. 57).[4]

At the conclusion of the hearing the district court made the following findings (III Tr. 171-172, 176):

> A review and analysis of the testimony as to the negotiations leading up to the offering of a plea in this court convinces this Court that there was in fact no actual plea agreement made. To put it in terms of context, I don't see that there was any meeting of the

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A (or Class One) cases are the most serious (III Tr. 104). Counsel stated that he was not certain how many cases were agreed upon; he thought it was five, but knew petitioner believed it was three (III Tr. 25).

[3]FBI Agent William Bolton testified that he had overheard defense counsel tell petitioner that if petitioner were able to give federal officials evidence of Class A violations, his sentence might be reduced by five years for each such case (III Tr. 104).

[4]However, Seward later stated (III Tr. 63): "There was a deal in my mind, that if [petitioner] pled guilty and performed, that the Government would make a recommendation for probation."



minds as to what the terms and conditions of the agreement actually were. Almost every witness who has testified with respect to those negotiations, has a different version of the agreement—everywhere from the testimony of the defendant that he understood the plea agreement to be that for every Class A deal that he provided or assisted the DEA on, five years would be knocked off the fifteen-year maximum that he was facing, to the testimony of the Assistant United States Attorney that if he cooperated with the Government, that his cooperation would be made known to the sentencing judge. In between, we have the testimony of the DEA agent who testified that that would include even recommending probation, and the testimony of counsel for the defendant, which I find to be equivocal, as to whether there was to be probation or whether he was to be out on the street or would merely be a recommendation of probation.

* * * * *

Since I have found that there never was a plea bargain as such, then, certainly, specific performance of it cannot be ordered. I don't think that there is any showing here that there was any prosecutorial misconduct that would permit the Court to dismiss the matter.

The real gist of the matter, I think, is that because there were attempts on the part of Defense Counsel to obtain the best deal that could be made available, and the willingness of the defendant to negotiate in any way to avoid a possible jail sentence, and because of the circumstances surrounding the time that the negotiations were actually entered into, that not enough time was taken to be specific to provide the details and to advise the Court fully of the agreement.

> And in that area, certainly, I cannot fault the Government or find that its conduct was impermissible.

On September 8, 1977, petitioner again pled guilty to a violation of 21 U.S.C. 841 in exchange for dismissal of the remaining counts of the indictment.[5] The court of appeals affirmed (Pet. App. A.1-A.2), rejecting petitioner's contention that the district court had erred in setting aside petitioner's first plea instead of enforcing the alleged agreement that he be placed on probation.

**ARGUMENT**

Petitioner's basic legal claim—that he was entitled to specific performance of a plea bargain under which he was allegedly promised that he would receive a sentence of probation—depends at the outset upon the existence of a bargain to that effect. The factual question whether any such bargain existed was resolved adversely to petitioner by the district court, whose findings were sustained by the court of appeals, and there is no occasion for further review of these findings by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967).[6]

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[5]The government agreed (IV Tr. 14) not to oppose an appeal by petitioner on any jurisdictional defects, and stated that it would defer dismissing the remaining counts of the indictment until the appeal was decided. At the Rule 11 hearing, the court explained to petitioner that the plea agreement provided that if petitioner subsequently disclosed information leading to the apprehension of persons responsible for certain Oakland County kidnap-murders, the government would not oppose withdrawal of the new guilty plea, and would at that time recommend that petitioner be placed on probation (IV Tr. 25-26).

[6]Petitioner's contention (Pet. 5-11) that he was denied an evidentiary hearing on the question of specific performance of the agreement is not supported by the record. As we have shown, the district court heard testimony at the pretrial suppression hearing on September 6, 1977, from the five individuals who were present at the plea negotiations, considered the testimony of each witness (III Tr. 171-172), and concluded that no agreement had been reached (III Tr. 171). The district court heard all the evidence petitioner proffered at that time, and petitioner has not identified any relevant evidence that was not considered by that court.



Petitioner seeks to introduce a legal issue by contending (Pet. 12) that the courts below held his plea bargain was not enforceable because it was not "fully spread on the record" and "reduced to writing." The courts below did not, however, rely on any technical defect to deny enforcement of a plea agreement. To the contrary, the district court found, as a matter of fact, that in their haste to conclude a plea bargain the parties had failed to reach complete agreement on the terms of the bargain. The court found (III Tr. 171) that there was never any "meeting of the minds," and thus no agreement that could be enforced.

The court of appeals correctly concluded (Pet. App. A.2) that the record amply supports the district court's finding: each witness had a different understanding of the plea "agreement."[7] Even the testimony of Mr. Howard, petitioner's counsel during these negotiations, supports the finding that no agreement ever jelled; he stated (III Tr. 38) that although he understood petitioner would be "[o]n the street" if he provided evidence in the requisite number of cases, there was no discussion of "the means by which he would accomplish that objective."[8]

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[7]Indeed, petitioner's counsel emphasized this very point in his argument to the trial court; he pointed out that there had been testimony describing at least three distinctly different agreements (III Tr. 158-159).

[8]We note, finally, that since the prosecutor has no power to commit the court to impose a sentence of probation (see Fed. R. Crim. P. 11(e)(1)), there is no legal basis for specifically enforcing any such *ultra vires* promise. If a defendant's plea was induced by such a promise, the remedy is to set aside the plea. See *United States* v. *Hammerman,* 528 F. 2d 326 (4th Cir. 1975).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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